(1) Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

MICHAEL CRUMP,

Petitioner,

v.

BEST TEMPS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DELAWARE SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Delaware's displaced worker doctrine violate the Supremacy Clause of the United States Constitution and the Fourteenth Amendment to the Constitution because it requires an individual claiming total disability benefits under the workers' compensation laws of the State of Delaware to waive his or her rights under the Americans With Disabilities Act, 42 U.S.C. § 12101, *et seq.*?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	v
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	12

TABLE OF CITED AUTHORITIES

Page

Cases:

Air Mod v. Newton, Del. Supr., 215 A.2d 434 (1965) 8

Ellison v. Software Spectrum, Inc., 85 F.3d 187 (5th Cir. 1996) 7

Franklin Fabricators v. Irwin, Del. Supr., 306 A.2d 734 (1973) 4, 5, 10

Keeler v. Metal Masters, Del. Super., C.A. No. 97A-06-002, Terry, R.J. (December 31, 1997), *aff'd*, 712 A.2d 1004 (Del. 1998) 3

Ray v. Glidden Co., 85 F.3d 227 (5th Cir. 1996) .. 7

Schmitt v. Cecil Vault, Del. Super., C. A. No. 82A-NO-12, Bifferato, J. (August 17, 1983) 5, 6, 8

Statutes:

28 U.S.C. § 1257(a) 1

28 U.S.C. § 2403(b) 1

42 U.S.C. § 12101, *et seq.* i

42 U.S.C. § 12101(a) 9

Cited Authorities

	Page
42 U.S.C. § 12102(2)	7
42 U.S.C. § 12102(2)(C)	7
42 U.S.C. § 12112(d)(2)(A)	2
United States Constitution:	
Article VI	2
Fourteenth Amendment	i, 2
Rule:	
Supr. Ct. R. 29.4(c)	1

TABLE OF APPENDICES

Page

Appendix A — Order Of The Supreme Court Of The State Of Delaware Dated And Decided August 26, 1999 ..... 1a

Appendix B — Order Of The Superior Court Of The State Of Delaware In And For Kent County Dated And Decided March 9, 1999 ..... 3a

Appendix C — Decision Of The Industrial Accident Board Of The State Of Delaware On Petition For Termination Of Benefits Dated June 25, 1998 .. 14a

Petitioner Michael Crump respectfully requests that a Writ of Certiorari be issued to review the judgment of the Delaware Supreme Court in this case.

OPINIONS BELOW

A copy of the unpublished order of the Delaware Supreme Court in *Crump v. Best Temps*, No. 97, 1999 (Del. Aug. 26, 1999), is attached hereto (App. A). The unpublished opinion of the Delaware Superior Court in *Crump v. Best Temps*, C. A. No. 98A-06-002 HDR (Del. Super. March 9, 1999), is also attached hereto (App. B.). Finally, the unpublished opinion of the Industrial Accident Board in *Crump v. Best Temps*, Hearing No. 1108926 (Del. IAB June 25, 1998), is attached hereto (App. C.).

STATEMENT OF JURISDICTION

The judgment of the Delaware Supreme Court was entered on August 26, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Because the constitutionality of a judicial doctrine under Delaware law, the displaced worker doctrine, is drawn into question by this appeal, 28 U.S.C. § 2403(b) may apply. Accordingly, this Petition shall be served on the Attorney General of the State of Delaware pursuant to Supr. Ct. R. 29.4(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI of the United States Constitution provides in relevant part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law. . . ."

42 U.S.C. § 12112(d)(2)(A) provides in relevant part: ". . . a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability."

STATEMENT OF THE CASE

The proceedings in this case began before the Industrial Accident Board of the State of Delaware (hereinafter "IAB" or "Board"), the Delaware administrative agency with primary jurisdiction over workplace injuries in the State of Delaware. The instant case began with the Employer/ Respondent's filing of a petition to terminate Mr. Crump's ongoing total disability benefits on January 15, 1998. That petition came before the IAB at a hearing on June 16, 1998, at which time Petitioner's counsel raised the issue of conflict

between the Americans with Disaiblities Act, *supra*, and the Displaced Worker Doctrine, and contended that the Displaced Worker Doctrine was unconstitutional under the Supremacy Clause of the United States Constitution. *See* Trial Transcript at pp. 93, 139. Following the hearing, the Board entered an order terminating Mr. Crump's ongoing total disability benefits, the Board having declined to pass on the constitutionality argument. *Michael Crump v. Best Temps*, IAB Hearing No. 1108926 (June 16, 1998).

The Petitioner subsequently appealed the Board's decision terminating Petitioner's ongoing total disability benefits to the Superior Court of the State of Delaware. Therein, the Petitioner asserted that the Displaced Worker Doctrine, as applied in Delaware by the Industrial Accident Board, violated due process and the Supremacy Clause of the United States Constitution. The Superior Court, referencing its earlier decision in *Keeler v. Metal Masters*, Del. Super., C.A. No. 97A-06-002, Terry, R.J. (December 31, 1997), *aff'd*, 712 A.2d 1004 (Del. 1998), ruled that the displaced worker doctrine and the ADA and the parallel Delaware Statute, the Delaware Handicapped Persons Employment Protection Act, do not conflict. *Id.* at 10. The Superior Court affirmed the Board's termination of Mr. Crump's total disability benefits.

Parenthetically, the Superior Court's decision in *Keeler*, *supra*, had been appealed to the Delaware Supreme Court, which had ruled that the constitutional issue was not ripe for decision because Mr. Keeler had not performed a reasonable job search. Because the Court's decision turned on the Board's credibility determination, which was affirmed, the Court had declined to reach the constitutional issue presented. *Keeler v. Metal Masters*, Del. Supr., 712 A.2d 1004, 1006 (1998).

Following the Superior Court's decision in *Crump v. Best Temps*, Mr. Crump took a further appeal to the Supreme Court of the State of Delaware, again raising the conflict between the Constitution and the Displaced Worker Doctrine. The Delaware Supreme Court, after briefing and oral argument, affirmed the Superior Court's decision in a one-page order that referenced "the reasons set forth in, [sic.] the well-reasoned decision of the Superior Court. . . ." *Crump v. Best Temps*, Del. Supr., No. 97, 1999, Walsh, J. (August 26, 1999).

Petitioner thereafter has filed the instant Petition for Writ of Certiorari with the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

The basis for the grant of a Writ of Certiorari in the instant case is that the Delaware Supreme Court has decided an important question of federal law that has not been, but should be, settled by this Court. The issue presented by this case involves the interaction between the Americans with Disabilities Act and the judicially-created Displaced Worker Doctrine under Delaware's workers' compensation law.

The leading case on the Displaced Worker Doctrine in Delaware is *Franklin Fabricators v. Irwin*, Del. Supr., 306 A.2d 734 (1973). Therein, the Delaware Supreme Court described the doctrine as follows:

> If the evidence of degree of obvious physical impairment, coupled with other factors such as the injured employee's mental capacity, education, training, or age, places the employee *prima facie* in the "odd-lot" category, as defined

> in *Hartnett* and *Ham*, the burden is on the employer, seeking to terminate total disability compensation, to show the availability to the employee of regular employment within the employee's capabilities. This was the situation in *Ham* and *Bigelow v. Sears, Roebuck & Company*, Del. Supr., 206 A.2d 906 (1969). If, on the other hand, the evidence of degree of physical impairment, coupled with the other specified factors, does not obviously place the employee *prima facie* in the "odd-lot" classification, the primary burden is upon the employee to show that he has made reasonable efforts to secure suitable employment which have been unsuccessful because of the injury; upon such *prima facie* showing of "odd-lot" classification, the *Ham* burden of proof is imposed upon the employer, seeking to terminate total disability compensation, to show availability to the worker, thus "displaced", of regular employment within his capabilities.

306 A.2d at 737.

The Superior Court further expounded on the methods of proof available to a claimant under the Displaced Worker Doctrine in *Schmitt v. Cecil Vault*, Del. Super., C. A. No. 82A-NO-12, Bifferato, J. (August 17, 1983). In *Schmitt*, the claimant testified that he had made 2-4 job applications per week and that he had been unsuccessful in obtaining employment. The Court noted that presenting evidence that prospective employers had said they would not hire the claimant because of his handicap is not the sole means by which the Claimant may satisfy the displaced worker burden

of proof. In addition, the Court held that "if a claimant makes such efforts *and informs prospective employers of his physical impairment* and is unsuccessful, it is reasonable to infer from these facts that there is no reasonably stable market for his services which are limited because of his injury." *Id.* (emphasis added).

The first method of proof referenced by the Court in *Schmitt*, presenting evidence that prospective employers testified that they would not hire the Claimant because of his injury, is, as a practical matter, an impossibility. Such admissions are not forthcoming from employers, and particularly not under oath at a legal proceeding, as they could subject the prospective employer to a charge of employment discrimination under the Americans with Disabilities Act and any corresponding state statute, such as Delaware's Handicapped Persons Employment Protection Act. Thus, this method, while technically an available means of proving the workers' compensation claimant's case, is realistically not available to claimants.

The second method described in *Schmitt*, *supra*, is a job search which includes disclosure by the claimant of his physical impairment, which search is not successful in obtaining employment for the Claimant. It is this sole remaining means by which the Claimant may establish that he is a displaced worker that violates the Supremacy Clause of the United States Constitution by virtue of its conflict with the Americans with Disabilities Act.

As an initial matter, the applicability of the Americans with Disabilities Act to workers' compensation claimants generally, and to Petitioner in particular, is not a difficult question. The Americans with Disabilities Act is drawn very

broadly, to encompass all individuals with a "disability." The term disability is defined very broadly under the statute:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). Further, "major life activity" can include not simply working, but also such activities as lifting, reaching, sitting or standing. *Ray v. Glidden Co.*, 85 F.3d 227 (5th Cir. 1996). Under subsection (C) of § 12102(2), an injured worker need not even have an impairment that would qualify as a disability — he need only be thought of as having such an impairment. Further, while an injury that precludes one type of job does not constitute a substantial limitation in the ability to work, the impairment that precludes that type of work generally is sufficient to create such a limitation. *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996). Indeed, the prospective employer's perception that such limitation exists is sufficient to afford the applicant the protections of the ADA. *Id.*

Specifically with reference to Mr. Crump, his injuries are so substantial as to limit him to sedentary duty only, even according to the Employer's medical witness. It seems self-evident that Mr. Crump would be protected by the provisions of the ADA, pursuant to which even being regarded as having an impairment of a major life activity is sufficient to warrant protection under the statute.

Thus, under Delaware law, once a workers' compensation claimant applies for jobs and discloses his injury, if he is not hired, a presumption arises under *Schmitt* that he was unsuccessful in his job search because of his injury. Clearly, in the absence of disclosure of the Claimant's injuries and limitations, there can be no inference — the prospective employer must know of the injury in order to decline to hire the Claimant on that basis. Further, the Claimant is *required* to disclose his injuries to prospective employers, lest he be barred from receiving workers' compensation benefits in the future. *Air Mod v. Newton*, Del. Supr., 215 A.2d 434 (1965). As a result, under Delaware workers' compensation law, the Claimant is compelled to make an election of remedies. He is forced to choose between the ADA and DHPEPA, which afford him a greater opportunity to return to work, and the Delaware workers' compensation law, which affords him benefits if he is unable to return to work because of his injury, but which denies him the protections of the antidiscrimination statutes. This requirement that the Claimant elect his remedies between workers' compensation and the Americans with Disabilities Act works a deprivation of either the federally-protected rights afforded by the antidiscrimination statutes or the legislative remedy of workers' compensation, the exclusivity provisions of which bar any other action at common law against the employer for the Claimant's injuries.

The United States Congress has made legislative findings concerning the existence of discrimination:

> . . . [H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with

> disabilities continue to be a serious and pervasive social problem;
>
> . . . [D]iscrimination against individuals with disabilities persists in such critical areas as employment, housing, public accomodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
>
> * * *
>
> . . . [I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;
>
> . . . [C]ensus data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically and educationally . . .

42 U.S.C. § 12101(a). United States Congressional findings recognize the pervasive existence of discrimination and disparate treatment of those with physical disabilities and limitations. Congress has specifically recognized that this

disparate treatment and outright discrimination exists in the area of employment. However, notwithstanding these federal findings, Delaware workers' compensation claimants must repeatedly prove the existence of this discrimination under the Displaced Worker Doctrine, by demonstrating that they have looked for work but been denied because of their injury, in order to obtain or continue to obtain lost wage benefits following an industrial injury.

The instant case is a perfect example of the injustice that results from the conflict between the federal right granted under the ADA and the Delaware Displaced Worker Doctrine. The Industrial Accident Board found that Mr. Crump was not *prima facie* displaced. The burden under *Irwin*, *supra*, shifted to Mr. Crump to demonstrate that he had looked for work but had been denied because of his injury. Mr. Crump had a documented job search of literally hundreds of job applications. Based on evidence of a job search that was characterized by the Board as "extensive," the Board found that Mr. Crump had met his burden of proving that he had looked for work but been denied because of his injury. In order to obtain that result, Mr. Crump had relinquished his rights under the Americans with Disabilities Act: by disclosing his injury and limitations to the prospective employers, Mr. Crump effectively waived the protections afforded by the ADA which are intended to help Mr. Crump reach parity and compete on an equal footing with other, nondisabled applicants for those positions.

The Employer's case involved a vocational specialist who testified as to nine jobs she had found meeting Mr. Crump's qualifications and restrictions, that she believed were available to Mr. Crump, but that none of these employers had offered employment to Mr. Crump. She gave

her opinion without ever having met the Claimant, so she had no idea that Mr. Crump had a severe speech impediment that would preclude any employment involving telephone communications. After excluding those jobs from the labor market survey, a mere four jobs remained which the Board felt were appropriate for Mr. Crump. The Board terminated Mr. Crump's total disability benefits on the basis of those four jobs.

The end result is that Mr. Crump has been forced to abandon the protection afforded by the ADA in favor of his worker's compensation claim, for which he was successful in meeting his burden, and yet he still has no job and no workers' compensation benefits. He has effectively been denied the assistance of both systems, each of which has as its primary purpose the protection of Mr. Crump and people like him.

CONCLUSION

Delaware's Displaced Worker Doctrine violates the Americans with Disabilities Act and the Supremacy Clause of the United States Constitution, in that it requires injured workers to abandon the rights afforded by the ADA in the pursuit of an action to recover workers' compensation benefits. The application of the Displaced Worker Doctrine by the Delaware Industrial Accident Board and the Delaware Superior and Supreme Courts abridges the workers' compensation claimant's federal right to equal protection of the laws. The peculiar result in Delaware, as demonstrated by the instant case, is that workers' compensation claimants who also fall within the protection of the Americans with Disabilities Act and who should have the benefit of both systems, are effectively afforded *less* protection, rather than greater protection that should be afforded by coverage under both statutes. It is this hardship that results from the conflict between the Americans with Disabilities Act and the Delaware Displaced Worker Doctrine that Petitioner seeks to remedy by resort to this Petition for Certiorari. Petitioner therefore humbly requests that the Court consider and grant Petitioner's application.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE SUPREME COURT OF THE STATE OF DELAWARE DATED AND DECIDED AUGUST 26, 1999

IN THE SUPREME COURT OF THE
STATE OF DELAWARE

No. 97, 1999

MICHAEL CRUMP,

Claimant Below,
Appellant,

v.

BEST TEMPS,

Employer Below,
Appellee.

Court Below: Superior Court of the State of
Delaware in and for Kent County
C.A. No. 98A-06-002

Submitted: July 27, 1999
Decided: August 26, 1999

Before WALSH, HOLLAND, and BERGER, Justices.

ORDER

This 26th day of August 1999, upon consideration of the briefs of the parties, we conclude that this appeal should

be affirmed on the basis of, and for the reasons set forth in, the well-reasoned decision of the Superior Court dated March 9, 1999.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is,

AFFIRMED.

BY THE COURT:

s/ [illegible]
Justice

APPENDIX B — ORDER OF THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY DATED AND DECIDED MARCH 9, 1999

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

C.A. No. 98A-06-002 HDR

MICHAEL CRUMP,

Claimant Below-
Appellant,

v.

BEST TEMPS,

Employer Below-
Appellee.

Submitted: January 4, 1999
Decided: March 9, 1999

* * *

RIDGELY, President Judge

ORDER

This 9th day of March, 1999, upon consideration of briefs filed by counsel and the record below, it appears that:

Appendix B

(1) Appellant, Michael Crump ("Crump") filed this appeal from the June 25, 1998 decision of the Industrial Accident Board ("Board") terminating his ongoing total disability benefits.

(2) On August 8, 1997, while employed with Best Temps, Crump fell while chipping ice out of a freezer and sustained compensable injuries to his low back, hip and groin. Shortly thereafter, Crump sought treatment from his physician, Dr. Rudin. After examining the extent of Crump's injuries, Dr. Rudin instructed Crump not to return to work. Thereafter, Crump began receiving total disability benefits.

(3) Prior to the August 1997 accident, Crump sustained a serious injury to his lower back in October of 1993, while in the employ of James Julian, Inc. As a result of the severity of the injuries sustained, Crump underwent a lumbar fusion at two levels which was performed by Dr. Rudin on September 27, 1994.

In January of 1996, Dr. Rudin referred Crump for a functional capacities evaluation in order to determine Crump's physical capabilities following the 1993 work related injury. This test was performed nearly a year and a half after Crump's lumbar fusion surgery took place. At this point, Crump was well past the time that is generally considered a good bench mark for considering an injury to be permanent in that further improvement would not be expected. Crump's functional capacities evaluation determined that he was limited to performing sedentary work on a part-time basis. Thereafter, in 1996, Dr. Rudin released Crump to return to light duty work on a trial basis in order

to determine how Crump was able to tolerate the physical demands of light duty employment. In August of 1996, Crump's lost wage claim with the worker's compensation carrier for James Julian, Inc. was commuted for the lump sum of $60,000.00 and he was compensated for a 30% impairment to his low back as a result of his 1993 injury.

Crump next sought treatment from Dr. Rudin on December 11, 1996, more than three years after his October 1993 injury. At this examination, Crump noted that he was doing poorly in that he had attempted to return to work in several different positions but, due to extensive back pain, he was physically unable to work. Thereafter, Crump did not seek further treatment from Dr. Rudin until after his August 1997 accident.

Upon returning to Dr. Rudin, Crump stated that he had been able to work pain free until the accident with Best Temps occurred. This report contradicted the statements made by Crump to Dr. Rudin during his December 11, 1996 visit, however. After examining Crump's injuries, Dr. Rudin noted a fracture of the femur and a lumbar strain which was an exacerbation of Crump's prior problem. Dr. Rudin started Crump on physical therapy and instructed him not to return to work. Shortly thereafter, Crump began receiving total disability benefits.

(4) On January 15, 1998, Best Temps filed a petition to terminate Crump's total disability benefits on the basis that Crump's total disability had ended and he had been released to return to work on a sedentary to light duty basis.

Appendix B

At the hearing before the Board, Dr. Rudin and Dr. Case offered testimony, through depositions, as to the extent of Crump's injuries. Specifically, Dr. Case testified that he examined Crump on December 16, 1997 and March 24, 1998. Based on these examinations and a review of Crump's medical records, Dr. Case concluded that Crump was still having symptoms from his prior back injury at the time of the August 1997 slip and fall. Although Crump reported an increase in symptoms after his 1997 injury, there was no disruption to the spine fusion as a result of the Best Temps injury. Therefore, after the December 1997 examination, Dr. Case recommended that Crump be restricted to obtaining sedentary to light duty employment. However, at the March 1998 examination, Crump reported an increase in symptoms. Dr. Case testified that Crump demonstrated a decreased range of motion in his back in March of 1998 than he had displayed at the December 1997 examination, despite having participated in physical therapy. Based on Crump's subjective complaints, Dr. Case restricted Crump to performing sedentary work only.

Similarly, Dr. Rudin offered testimony as to Crump's medical condition. Dr. Rudin testified that he has been Crump's treating physician since the 1993 industrial accident. Dr. Rudin stated that in May of 1996 he released Crump to perform sedentary to light duty work, however, due to Crump's increased complaints, Dr. Rudin considered Crump totally disabled as of December, 1996. Dr. Rudin testified that after the 1997 work accident he re-examined Crump and diagnosed a fracture in the hip and a lumbar sprain. Dr. Rudin stated that the lumbar sprain was an exacerbation of Crump's previous injury. Thereafter, in

January of 1998, Dr. Rudin opined that Crump was not quite back to his pre-accident condition. Moreover, Dr. Rudin explained that in March of 1998, he examined Crump again and determined that he was totally disabled. However, Dr. Rudin indicated that Crump should be able to return to work in two months with sedentary work restrictions. Lastly, Dr. Rudin testified that Crump has a severe stuttering problem in that he can barely complete a sentence without stuttering. Dr. Rudin noted that Crump had been treated unsuccessfully in the public school system for his speech impediment and most recently sought treatment from Dr. Giletto.

In addition to the testimony offered by Drs. Case and Rudin, Barbara Stevenson, a vocational rehabilitation specialist testified regarding the results of her labor market survey. Ms. Stevenson conducted a labor market survey in order to determine the availability of suitable employment for an individual with Crump's capabilities. Ms. Stevenson testified that she located nine sedentary entry-level positions and one light duty position. However, at the time Ms. Stevenson conducted her labor market survey, she was unaware of the existence of Crump's speech impediment. Therefore, depending on the severity of the stutter, Ms. Stevenson testified that five of the identified positions may fall outside of Crump's qualifications. Lastly, in explaining the results of her labor market survey, Ms. Stevenson noted that Delaware's unemployment rate was at an all-time low at under 5 percent. In light of her findings and the strength of the Delaware job market, Ms. Stevenson opined that Crump would be able to find a job paying at least minimum wage, provided he conduct a bona fide job search in an effort to obtain employment.

Appendix B

In response, Crump testified that he was 33 years old, has a high school education, has no experience with computers or business machines and cannot type or take shorthand. Crump stated that, although Dr. Rudin had advised him not to work after his 1997 injury, he did conduct a thorough job search, focusing mainly on management level positions, but was unable to find employment due to his work related injury. In support of his contention, Crump provided the Board with a 188 page document compiling his job search efforts including copies of his resume, completed employment applications and newspaper advertisements for job openings that he had responded to. Moreover, Crump stated that there were four employers who specifically refused to hire him because of his injury. Lastly, in support of his position, Crump submitted into evidence letters from several of the employers named in the labor market survey implying that Ms. Stevenson did not comply with the necessary requirements of performing a labor market survey.

(5) Based on the testimony and the evidence presented, the Board determined that Crump was no longer totally disabled. In reaching its decision, the Board relied on Dr. Case's testimony that Crump was capable of sedentary work and, therefore, was medically capable of returning to work. After making this determination, the Board shifted the burden of proof from Best Temps to Crump to demonstrate that he is vocationally displaced, either because he is *prima facie* a displaced worker or because he made a reasonable job search that failed because of his work related injury.

Although the Board questioned the sincerity of Crump's job search efforts, the Board determined that, based on the

number of contacts Crump made to employers looking for work and the number of applications he submitted, Crump conducted a reasonable job search that was unsuccessful because of his work related injury. Once Crump met this burden, the Board, once again, shifted the burden to Best Temps to show the availability of employment within Crump's restrictions. The Board focused on the testimony of Ms. Stevenson and concluded that, based on the low unemployment rate throughout Delaware, the results of the labor market survey and the supporting testimony, Best Temps satisfied its burden of proving the availability of employment within Crump's restrictions and, therefore, Crump was not entitled to continue receiving total disability compensation. Thus, the Board granted Best Temps petition to terminate and declined to award Crump any temporary partial disability benefits on the basis that Crump suffered no diminution of his earning capacity. Thereafter, Crump filed this appeal.

(6) On appeal, Crump contends that in placing the burden of proof upon him to demonstrate that he made reasonable efforts to secure employment which were unsuccessful because of his injury the Board essentially forced him to relinquish his rights under the Americans with Disability Acts ("ADA") and the Delaware Handicapped Persons' Employment Protections Act ("DHPEPA") to decline to advise prospective employers of his limitations. Based on this assertion, Crump argues that the displaced worker doctrine is in conflict with the ADA and DHPEPA and thus, must be discarded or amended to conform to the Federal Act. Additionally, Crump maintains that the Board's decision is not supported by substantial evidence in that Best

Temps failed to adequately prove that jobs were available to Crump. Moreover, Crump argues that the Board's decision is against the great weight of the evidence since Crump has demonstrated an extensive job search which was accepted by the Board. Therefore, based on the record below, Crump maintains that the Board's decision is not supported by substantial evidence and, therefore, must be reversed.

(7) In response, Best Temps contends that the Board's decision is supported by substantial evidence in that, after considering the conflicting medical testimony, the Board accepted Dr. Case's conclusion that Crump was physically capable of performing sedentary work and that he was no longer physically disabled. Additionally, the testimony of Ms. Stevenson regarding the number of jobs available to an individual with Crump's medical restrictions was sufficient to support the Board's decision that jobs were available to Crump within his restrictions. Furthermore, Best Temps contends that substantial evidence exists to support the Board's decision that Crump was not a *prima facie* displaced worker since Crump possesses a varied employment background and has ample management experience. Thus, Best Temps maintains that Crump is not entitled to receive total disability benefits. Lastly, Best Temps contends that the displaced worker doctrine does not conflict with the ADA or the DHPEPA in that those statutes do not bar an individual from proving that he has conducted a reasonable job search. Therefore, for the reasons stated above, Best Temps contends that the decision of the Board is supported by substantial evidence and thus, must be affirmed.

(8) Upon an appeal from a decision of the Industrial Accident Board, the role of this Court is to determine whether

substantial evidence exists on the record to support the Board's decision and if the decision is free from legal error.[1] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[2] If there is substantial supporting evidence for the Board's decision and no mistake in law, the decision will be affirmed.[3] This Court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[4] It merely determines if the evidence is legally adequate to support the Board's factual findings.[5]

(9) It is well settled in Delaware that "[t]he function of reconciling inconsistent testimony or determining credibility is exclusively reserved for the Board."[6] Additionally, "[i]t

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1. *General Motors Corp. v. Freeman*, Del. Supr., 164 A.2d 686, 688 (1960); *Johnson v. Chrysler Corp.*, Del. Supr., 213 A.2d 64, 66 (1965); *General Motors Corp. v. Jarrell*, Del. Super., 493 A.2d 978, 980 (1985).

2. *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, Del. Supr., 636 A.2d 892, 899 (1994); *Battista v. Chrysler Corp.*, Del. Super., 517 A.2d 295, 297 (1986), *app. dism.*, Del. Supr., 515 A.2d 397 (1986).

3. *Longobardi v. Unemployment Ins. Appeal Bd.*, Del. Super., 287 A.2d 690, 692 (1971), *aff'd*, Del. Supr., 293 A.2d 295 (1972).

4. *Johnson v. Chrysler Corp.*, Del. Supr., 213 A.2d 64, 66 (1965).

5. 29 *Del. C.* § 10142(d).

6. *Simmons v. Delaware State Hospital*, Del. Supr., 660 A.2d 384, 388 (1995) (citing *Breeding v. Contractors-One-Inc.*, Del. Supr., 549 A.2d 1102, 1106 (1988)).

is entirely proper and appropriate for the Board to accept the medical testimony of one expert witness over that of another."[7] Therefore, in reaching its decision, the Board's acceptance of Dr. Case's testimony regarding the extent of Crump's disability was completely within the Board's discretion and thus, not contrary to law.

Moreover, in reaching its conclusion, the Board relied on the testimony of Ms. Stevenson and concluded that Best Temps had met its burden of demonstrating the availability of employment within Crump's capabilities. The Board's decision was based on the low unemployment rate throughout Delaware, the results of the labor market survey and the supporting testimony of Ms. Stevenson. Therefore, there is substantial evidence in the record to support the Board's decision.

(10) Lastly, in *Keeler v. Metal Masters Inc.*, the Court addressed the displaced worker doctrine in the context of the ADA and DHPEPA. In deciding the same issue as presented in this case, the Court determined that "[t]he displaced worker doctrine and the ADA and DHPEPA do not clash."[8] In reaching its decision, the Court noted that "[a]lthough the claimant must prove that he conducted a reasonable job search, he is not prevented from doing so by

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7. *Simmons*, 660 A.2d at 388 (citing *General Motors Corp. v. Veasey*, Del. Supr., 371 A.2d 1074 (1977), *overruled on other grounds by*, *Duvall v. Charles Connell Roofing*, Del. Supr., 564 A.2d 1132 (1980)).

8. *Keeler v. Metal Masters Inc.*, Del. Super., C.A. No. 97A-06-002, Terry, R.J. (Dec. 31, 1997) (Opinion).

the anti-discrimination statutes. The existence of a job applicant's disability can properly be considered under the anti-discrimination statutes and in a proper case a claimant can meet his burden of proof under the Workmen's Compensation laws either by direct or inferential evidence."[9]

For the reasons stated above, this Court finds that substantial evidence exists to support the Board's decision terminating Crump's total disability benefits and further that there was no legal error.

NOW, THEREFORE, IT IS ORDERED that the decision of the Industrial Accident Board is ***AFFIRMED***.

s/ [illegible]
President Judge

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9. *Id.*

APPENDIX C — DECISION OF THE INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE ON PETITION FOR TERMINATION OF BENEFITS DATED JUNE 25, 1998

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

Hearing No. 1108926

MICHAEL CRUMP,

Employee,

v.

BEST TEMPS,

Employer.

DECISION ON PETITION FOR TERMINATION OF BENEFITS

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on June 16, 1998, in the Hearing Room of the Board, Milford, Delaware.

PRESENT:

IRVING S. LEVITT

R. HOWARD SEWARD

* * *

Appendix C

NATURE AND STAGE OF THE PROCEEDINGS

On January 15, 1998, Best Temps filed a Petition for Termination of Benefits seeking to terminate the total disability benefits of Michael Crump ("Claimant") stemming from an August 8, 1997 work accident.

SUMMARY OF THE EVIDENCE

Claimant, age thirty-three, testified that in October 1993 he injured his back while working as a laborer for an employer other than Best Temps. As a result of that injury, Dr. Rudin performed lumbar fusion surgery. In April 1995, Dr. Freedman assessed a 43 percent permanent impairment to Claimant's low back. Pursuant to a compensation agreement, Claimant was paid workers' compensation benefits for a 30 percent permanent impairment of his low back. In December 1996 Claimant reported to Dr. Rudin that, despite several attempts, he was unable to work. As a result, Dr. Rudin recommended that he refrain from working.

Several months later, Claimant returned to work for Best Temps, as a laborer at the Dover Air Force Base. His next assignment, through Best Temps, was at Quality Kitchen. On August 8, 1997, Claimant slipped and fell while working in a freezer. He hurt his back, hip, and groin. Currently, Claimant experiences throbbing pain every day and sometimes cannot get out of bed for morning physical therapy appointments. He also has had muscle spasms since the August 1997 work accident. Before the August 1997 work accident, Claimant was doing well.

Appendix C

Claimant testified that Dr. Rudin has advised Claimant not to work. Claimant has looked for work anyway, because he needs the income. Claimant provided the Board with a 188-page document entitled "Look for Work Efforts." (Claimant's Exhibit No. 6.) It included his resume, copies of completed applications, and copies of newspaper advertisements for job openings that he has answered. In his job search, Claimant has focused mainly on management jobs. Claimant's work experience includes positions as a restaurant manager for three and one-half years and as a supervisor for a cleaning service for six years. He has a high school diploma.

Claimant stutters. He received treatment for his stutter throughout his school years but it did not help. Claimant does not have a driver's license.

Jerry L. Case, a board certified orthopedic surgeon, testified by deposition on behalf of Best Temps. Dr. Case examined Claimant on December 16, 1997, and March 24, 1998, and reviewed his medical records. The August 1997 work accident caused a minor hip fracture that had healed by the December 1997 examination. From the medical records, Dr. Case concluded that Claimant was still having symptoms from his prior back injury at the time of the August 1997 slip and fall. Prior to the August 1997 work accident, Claimant was on ongoing light duty work restrictions.

After the August 1997 fall, Claimant reported increased symptoms but there was no disruption of the spine fusion. After the December 1997 examination, Dr. Case recommended sedentary to light duty restrictions. However,

at the March 1998 examination, Claimant reported an increase in symptoms and, as a result, Dr. Case increased the work restrictions to sedentary duty. Claimant's examination and his interim history did not support an increase in complaints. Consequently, Dr. Case questioned Claimant's credibility.

Barbara Stevenson, a vocational rehabilitation specialist, testified on behalf of Best Temps. Ms. Stevenson completed a labor market survey to determine the availability of suitable employment for Claimant. (Employer's Exhibit No. 2.) At the time of the 1997 work accident, Claimant earned $5.00 per hour, which was the prevailing minimum wage rate. Ms. Stevenson identified nine sedentary entry-level positions and one light duty position. At the time Ms. Stevenson completed the survey, she was unaware of Claimant's speech impediment. Depending on the severity of the stutter, five of the identified positions may fall outside of Claimant's qualifications. Ms. Stevenson testified that the Delaware unemployment rate is below 5 percent and is at an all-time low.

Bruce J. Rudin, M.D., a board certified orthopedic surgeon, testified by deposition on behalf of Claimant. Dr. Rudin first saw Claimant in April 1994 following his first work accident and has treated Claimant since that time. In May 1996, Dr. Rudin released Claimant to sedentary to light duty work but in December 1996 Dr. Rudin considered Claimant totally disabled because of increased complaints. After the August 1997 work accident, Dr. Rudin diagnosed a lumbar sprain, an exacerbation of his previous condition, and a fracture in the hip. In January 1998, Dr. Rudin believed

that Claimant was "not quite back to baseline." Dr. Rudin last saw Claimant in March 1998 and he provided him with a total disability note indicating that Claimant should be able to return to work in two months. Claimant most likely will not be able to perform more than a sedentary position.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Total Disability

Best Temps has the burden of proving, by a preponderance of the evidence, that Claimant is no longer totally disabled. For the following reasons, the Board finds that Best Temps has met that burden.

Best Temps must first show that Claimant's August 1997 work injury no longer incapacitates him from work. At the time of the accident, Claimant was on ongoing light duty work restrictions. In December 1997, Dr. Case placed Claimant on sedentary to light duty work restrictions and then, in March 1998, Dr. Case increased his work restrictions to sedentary duty based on an increase of subjective complaints. In March 1998, despite finding that Claimant's condition had almost returned to his baseline, Dr. Rudin believed that Claimant was totally disabled. He recommended that Claimant refrain from working for two more months and then return to Dr. Rudin for a re-evaluation. Any update from Dr. Rudin since that time was not made part of the record. At the hearing, Claimant limped but was able to walk. Based on Dr. Rudin's opinion that Claimant was almost back to baseline and based on the Board's observations at the hearing, the Board accepts Dr. Case's

testimony that Claimant is at least capable of sedentary work. Therefore, the Board finds that Claimant is medically capable of returning to work.

Because Best Temps has shown that Claimant is no longer totally incapacitated, the burden shifts to Claimant to show that he is vocationally displaced, either because he is *prima facie* a "displaced worker" or because he made a reasonable job search that failed because of his work injury. *Torres v. Allen Family Foods*, Del. Supr., 672 A.2d 26, 30 (1996). In this case, because Claimant had ongoing light duty work restrictions prior to his work injury, Claimant's job search must fail because of the increase in work restrictions attributable to his August 1997 work accident. If Claimant makes such a showing, then the burden shifts back to Best Temps to show the availability of work within Claimant's capabilities. *Id.*

Claimant submitted copies of notes and applications indicative of an extensive job search. The Board, though, has some concerns regarding the sincerity of Claimant's efforts. For example, Claimant's resume does not reflect his over nine years of management experience. Instead, Claimant focused on his experience as a laborer, despite his work restrictions, which he identified on his resume. However, based on the number of contacts he made to employers looking for workers and the number of applications he submitted, the Board finds that Claimant made a reasonable job search that failed because of his work injury.

Because he made a reasonable job search, Best Temps must show the availability of suitable employment. Ms.

Stevenson identified nine sedentary positions and offered testimony regarding the current availability of entry-level positions and Delaware's low unemployment rate. Ms. Stevenson asserted that five of the identified positions were questionable, depending on the severity of Claimant's speech impediment. The Board agrees that Claimant may not be capable of positions that consist primarily of telephone communications with customers but finds that his speech impediment would not disqualify him from work that requires substantial communication with coworkers and/or limited communication with the public. Regarding the labor market survey, Claimant certainly is capable of performing the security guard, surveillance operator, and management trainee positions. After all, Claimant's stutter did not prevent him from working, at the management level, for over nine years.

Therefore, based on the low unemployment rate throughout Delaware and based on the labor market survey and supporting testimony, the Board finds that Claimant is not vocationally displaced. Because Claimant is not medically totally disabled and is not vocationally displaced, the Board finds that Claimant is not totally disabled.

Partial Disability

In cases involving petitions to terminate total disability, the employer must show that the claimant is not partially disabled where there is evidence that there is a continued disability that could reasonably affect the claimant's earning capacity. *Waddell v. Chrysler Corp.*, Del. Super., C.A. No. 82A-MY-4, Bifferato, J., slip op. at 5 (June 7, 1983). Based

on Claimant's subjective complaints, both Dr. Rudin and Dr. Case found a continuing disability that increased Claimant's work restrictions beyond his preexisting light duty status. Since the increase in work restrictions could reasonably affect Claimant's earning capacity, Best Temps must show that Claimant is not partially disabled.

Claimant earned the prevailing minimum wage rate, or $5.00 per hour, at the time of the August 1997 work accident. Therefore, as long as Claimant is capable of full time work in some capacity and such work is available, then Claimant has suffered no loss of earning capacity and is not entitled to partial disability benefits. The Board has accepted Dr. Case's work restrictions and has found that Claimant is at least capable of sedentary work. In addition, the Board has found that entry-level sedentary employment is available. Consequently, because such employment pays at least minimum wage, Claimant has suffered no wage loss and is not partially disabled.

STATEMENT OF THE DETERMINATION

For the foregoing reasons, the Board GRANTS Best Temps' Petition for Termination of Benefits as of the date of filing.

Appendix C

IT IS SO ORDERED THIS 25 DAY OF JUNE, 1998.

INDUSTRIAL ACCIDENT BOARD

s/ Irving S. Levitt
Irving S. Levitt

s/ R. Howard Seward
R. Howard Seward